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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BENJAMIN KOHN,

Plaintiff,

v.

THE STATE BAR OF CALIFORNIA,
CALIFORNIA COMMITTEE OF BAR
EXAMINERS, and THEIR AGENTS IN
THEIR OFFICIAL CAPACITY,

Defendants.

Case No. 4:20-cv-04827-PJH

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S RENEWED MOTION FOR
PRELIMINARY INJUNCTION**

DATE: _____

TIME: _____

DEPT: _____

JUDGE: HON. PHYLLIS J. HAMILTON

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**DEFENDANTS’ RESPONSE IN OPPOSITION TO PLAINTIFF’S RENEWED MOTION
FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

Plaintiff Benjamin Kohn (“Plaintiff”) again asks this Court to issue a mandatory preliminary injunction ordering Defendant The Committee of Bar Examiners of the State Bar of California (“CBE”) to grant him additional testing accommodations for the upcoming October 2020 California Bar Examination. Plaintiff’s Renewed Motion for Preliminary Injunction (“Renewed Motion”) seeks this extraordinary relief despite the fact that the State Bar and CBE have approved substantial accommodations for him that meet or exceed the requirements of the Americans with Disabilities Act (“ADA”), including recently granting Plaintiff all of his requested additional testing time and a further-modified testing schedule after the denial of Plaintiff’s first motion for preliminary injunction.

Plaintiff’s Renewed Motion falls far short of meeting the high standard for this Court to issue a mandatory preliminary injunction. First, Plaintiff’s Renewed Motion fails to even provide the Court with a cognizable request for relief. After previously being denied a preliminary injunction seeking five specific accommodations (and nevertheless having since received two of them, along with clarifications from the CBE on the other three), Plaintiff now asks this Court to order Defendants to grant “all requested accommodations.” As explanation of what that entails, Plaintiff refers the Court to a four-page discussion of six “issues” with his accommodations, which appears to include at least twenty-two different requests, most of which are unclear, conditional, contradictory, and have not been previously raised.

Second, this Court has no basis to provide Plaintiff with any relief because Plaintiff has failed to provide proper evidence or citations in support of his contentions. The only attachment he offers to the Renewed Motion is a copy of the CBE’s August 27, 2020 letter communicating its final testing accommodations decision, and the Renewed Motion only makes two attempts to even cite to other materials, instead offering numerous uncited and unsupported fact-specific contentions throughout his 28-page Renewed Motion. In doing so, Plaintiff appears to be implicitly asking this Court and Defendants to search a 776-page, unverified “exhibit”—one that

1 was not even filed with the Renewed Motion—in order to find support for his claims. This
 2 improper support cannot provide a basis for this Court to find that Plaintiff has demonstrated that
 3 he is entitled to any relief whatsoever.

4 Moreover, even if this Court were to find that Plaintiff has made a cognizable request for
 5 relief and has offered evidence in support, Plaintiff is still unable to demonstrate that the law and
 6 facts clearly favor his position, because (1) most of Plaintiff’s statutory claims fail as a matter of
 7 law; and (2) Plaintiff has failed to sufficiently plead in his Amended Complaint, or to argue in
 8 his Renewed Motion, that he is entitled to relief under the ADA in light of the substantial
 9 accommodations he acknowledges that he has already been provided.

10 Finally, Plaintiff fails to allege irreparable harm should his request for injunction be
 11 denied, as his allegations appear to assume that he would be guaranteed to pass the Examination
 12 if his Renewed Motion is granted. Moreover, the admitted availability of future examination
 13 administrations means that any potential harm faced is not irreparable.

14 Accordingly, Plaintiff’s Renewed Motion should be denied.

15 **II. BACKGROUND**

16 **A. Plaintiff’s Allegations Regarding Prior Testing Accommodations.**

17 Plaintiff is a graduate of University of Iowa College of Law, and he seeks to become
 18 licensed to practice law in California. Renewed Mot. at 5:20–22. He states that he has been
 19 diagnosed with “a wide range of conditions” including “severe autism, neurodevelopmental
 20 disorder of impaired processing speed/variable attention executive functioning, fine/gross motor
 21 delay, Myofascial Pain Syndrome, Gastroparesis, Pelvic Floor Dyssynergia, irritable bowel
 22 syndrome with chronic constipation, and Keratoconus.” *Id.* at 5:24–27. As stated in his
 23 Amended Complaint, he alleges that his “disorders, illnesses, and conditions ... effectively
 24 handicap him in undertaking any test requiring extended periods of sitting and concentration.”
 25 Am. Compl. [Dkt. No. 32] ¶ 1.

26 Plaintiff previously took the July 2018, February 2019, and February 2020
 27 administrations of the California Bar Examination. Renewed Mot. at 9:15–16. Plaintiff did not
 28 pass the Examination in those three administrations, and has registered to take the upcoming

October (postponed from July) 2020 administration. *Id.* at 6:12. Plaintiff applied for testing accommodations based on his disabilities for each administration and has been granted substantial accommodations each time. In sum, even before his petition regarding the upcoming October 2020 Examination, Plaintiff states that he had already received, and thus continued to be eligible for, at least the following accommodations:

- 100% extra time plus an additional 30 minutes for each session of the examination;
- Testing in a semi-private room;
- Permission to use his own laptop computer;
- Permission to bring food and drink into the examination;
- Permission to remain in the examination room during breaks; and
- Permission to bring ergonomic equipment into the examination room.

Am. Compl. ¶¶ 41–52 and at 3:11–14.

B. Plaintiff's Allegations Regarding the Upcoming October 2020 Examination.

Plaintiff states that he filed a petition seeking all of the previously-granted testing accommodations above, as well as additional, previously-denied accommodations, in March 2020. Renewed Mot. at 6:12–13. Plaintiff alleges that he was initially told by State Bar staff that this appeal would be sent to the CBE for final determination at the June 19, 2020 CBE meeting. Then, on June 4, 2020, Plaintiff proceeded to file voluminous additional documentation, including multiple further medical reports, and was therefore informed that his file would require additional review and would be considered by CBE at its scheduled August 21, 2020 meeting.¹ *Id.* at 6:20–23.

1. Plaintiff's Initial Complaint and Motion for Preliminary Injunction.

Plaintiff filed his initial complaint and motion for preliminary injunction on July 18, 2020, a month before the scheduled CBE determination on his requests. Dkt. Nos. 1 and 2. In his initial complaint and motion, Plaintiff contended that Defendants had denied him effective

¹ Plaintiff also proceeded to file additional submissions with further medical reports on July 16, August 5, and August 10. Renewed Mot. at 7:8–11.

and reasonable accommodations in violation of Title II of the Americans with Disabilities Act (“ADA”), as well as other statutes, by not granting him the following further accommodations:

- 150% extra time on the written sections of the examination;
- A cap of no more testing time per day than non-disabled test takers;
- Ergonomic/physical equipment supplied in the examination room;
- “Specialized disability proctors;” and
- An additional 30 minutes of break time per 90 minutes of testing.

Dkt. No. 1 ¶ 25 and at 22:1–5; Dkt. No. 2 at 2:6–10. While Plaintiff’s initial complaint also sought compensatory damages related to all four examination administrations at issue, his initial motion for preliminary injunction asked this Court only for relief related to the October 2020 Examination, seeking a mandatory preliminary injunction either granting all of his requested accommodations, or in the alternative ordering the CBE to provide him with decisions and detailed findings on an accelerated timeline. Dkt. No. 2 at 2:2–18.

On August 13, 2020, this Court denied Plaintiff’s initial motion for preliminary injunction on the grounds that his claims were not ripe for federal judicial review. Specifically, this Court noted that CBE had not yet issued a final decision on Plaintiff’s accommodations, and that even after a final CBE decision, Plaintiff would be able to petition the California Supreme Court for review. Order Denying Motion for Preliminary Injunction [Dkt. No. 26] at 7:2–8:11.

2. CBE’s Final Decision.

CBE considered Plaintiff’s appeal at its August 21–22, 2020 meeting, and informed Plaintiff of its final decision on August 27, 2020. Ex. to Renewed Mot. [Dkt. No. 29-1]. CBE noted that prior to that meeting, State Bar staff had already updated their initial determination in light of Plaintiff’s additional medical reports, and had granted Plaintiff his full request for additional testing time, as well as granting a per-day testing time limit of 6.5 hours and scheduling the examination over six testing days. *Id.* While CBE declined to grant any further accommodations, CBE also clarified some additional points regarding Plaintiff’s various requests, namely: (1) Plaintiff would be free to use the additional total testing time he was granted to take breaks at his discretion; (2) while Plaintiff was not granted a fully-private testing

room or ergonomic equipment to be supplied in the examination room as an accommodation, in practice the State Bar's COVID-19 protocols mean that he will be tested in a private room, which will have a locking door where he may leave his own ergonomic equipment; and (3) all examination proctors would, as a matter of course, be "trained and required to perform their services to the best of their abilities." *Id.* In sum, in addition to the accommodations granted for previous examinations, for October 2020 Plaintiff has been granted two of the bullet-point accommodations that were the subject of his initial complaint and initial motion for preliminary injunction, and was offered clarifications on the other three. CBE summarized the full set of accommodations granted to Plaintiff for the October 2020 Examination as follows:

- "Double time and one-half for each session of the examination (during which time the applicant may take breaks at his discretion)...;
- Total testing time per day not to exceed 6.5 hours;
- Administration of the examination over an extended 6-day period;
- Testing in a semi-private room;
- Permission to use your own laptop computer and a backup computer...as an accommodation;
- Permission to bring food (must be unwrapped and non-aromatic) and drink (container must have a lid), subject to inspection by staff, into the examination room for all sessions of the examination...;
- Permission to remain in the examination room, with a proctor present, during the lunch breaks; and
- Permission to bring your own ergonomic chair, motorized adjustable workstation, and other ergonomic items, all subject to inspection by staff."

Id.

3. Plaintiff's Amended Complaint and Instant Renewed Motion.

In response to this CBE determination, Plaintiff did not seek review from the California Supreme Court. Rather, Plaintiff proceeded to file the instant Renewed Motion for Preliminary Injunction on August 31, 2020, and an Amended Complaint a week later on September 7, 2020. Plaintiff's Amended Complaint restates his initial complaint in full, while also adding a prefatory section of intended "Amendments" detailing the CBE's final decision, referring to the requests

1 “in Appendix C of his renewed motion for preliminary injunction,” and stating that Plaintiff
 2 intends to seek an additional count for damages based on the final CBE decision. *See Am.*
 3 *Compl.* at 2:9–8:25.

4 In the instant Renewed Motion, Plaintiff seeks a preliminary injunction from this Court
 5 granting him additional accommodations, far beyond the five accommodations previously at
 6 issue. The precise accommodations requested by Plaintiff are unclear, as his Renewed Motion
 7 states that he requests “the following disability accommodations,” Renewed Mot. at 5:3–4, but
 8 then fails to articulate them in the body of the Motion. Instead, Plaintiff only refers elsewhere
 9 for his request for relief, stating (1) that his “petition to the Committee lists all requested
 10 accommodations for the Fall 2020 exam in the Exhibits filed with his first motion for
 11 preliminary injunction,” *id.* at 5:15–16 (which “Exhibits” were a single 776-page, unverified
 12 collection of documents submitted with his prior motion, *see* Dkt. Nos. 15 and 16), and (2) that
 13 his requested accommodations “are more concisely summarized in Appendix C.” Renewed Mot.
 14 at 5:16–17.

15 “Appendix C” to the Renewed Motion is a four-page long discussion of six purported
 16 “issues” surrounding Plaintiff’s accommodations. *Id.* at 32–35. “Appendix C” includes
 17 discussion by Plaintiff of numerous points, most previously unraised in any of Plaintiff’s court
 18 filings, including his desire for “Assignment to From Home Modality,” “Covid Risk Mitigation
 19 Accommodations if Proctored In-Person,” an autism-trained proctor, “stop the clock breaks,” use
 20 of a larger-screen monitor for ergonomic reasons, permission to “use restroom freely” if being
 21 tested remotely on web camera, exceptions to rules regarding exam space, an exemption from
 22 remote proctoring “security flags,” specific training of persons viewing or reviewing web camera
 23 footage, special “logon period flexibility,” ergonomic equipment provided in the examination
 24 room, a test center location of “minimal commute distance” from his residence along with
 25 commuting and lodging expenses, access to hotel group rates, and an exemption from
 26 requirements that food at the Examination must be non-aromatic. *Id.*

III. LEGAL STANDARD

A mandatory preliminary injunction is an “extraordinary and drastic remedy.” *Munaf v. Green*, 553 U.S. 674, 689 (2008) (citation and quotation omitted). To obtain any preliminary injunction, a plaintiff must establish that (1) he is likely to succeed on the merits of his claim; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) a preliminary injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). And, it is not enough that the claimed harm be irreparable; it also must be imminent. *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *Los Angeles Mem'l Coliseum v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

A mandatory preliminary injunction, however, “goes well beyond simply maintaining the status quo” and “is particularly disfavored.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994)). The burden on a party seeking a mandatory injunction is thus “doubly demanding.” *Id.* Such relief is “not granted unless extreme or very serious damage will result and [is] not issued in doubtful cases or where the injury complained of is capable of compensation in damages.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (citation omitted); *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011) (mandatory injunctions should not issue in “doubtful cases”). The movant “must establish that the law and facts *clearly favor* h[is] position, not simply that [h]e is likely to succeed.” *Garcia, supra*, 786 F.3d at 740 (emphasis in original).

IV. ARGUMENT

A. Plaintiff’s Renewed Motion Fails to Make a Cognizable Request for Injunctive Relief, is Not Supported By Competent Evidence or References, and Violates Numerous Civil Local Rules.

As an initial and dispositive matter, Plaintiff’s Renewed Motion is procedurally deficient because it fails to clearly articulate a cognizable request for relief, and because Plaintiff’s

1 numerous specific factual contentions lack any proper evidentiary support. Furthermore, these
 2 deficiencies (as well as others)² violate numerous Civil Local Rules.

3 **1. Plaintiff's Renewed Motion Violates Local Rule 7-2(b)(3) and,**
 4 **Moreover, Fails to State Any Cognizable Request for Relief.**

5 Plaintiff's Renewed Motion violates Civil Local Rule 7-2(b)(3), which requires a
 6 "concise statement of what relief or Court action the movant seeks" at the beginning of a motion
 7 filing. Not only does Plaintiff fail to make any mention of the relief sought until the fifth page of
 8 his Renewed Motion, but nowhere in the body of the Renewed Motion does Plaintiff ever
 9 describe the precise relief he seeks from the Court. Indeed, Plaintiff states that he "requests that
 10 the Court issue a preliminary injunction granting the following disability accommodations,"
 11 Renewed Mot. at 5:3–4, but then does not explain what those "following" accommodations are
 12 within the Renewed Motion itself. Rather, two paragraphs later Plaintiff includes a "Note"
 13 stating that the requested accommodations are not in the Renewed Motion, but rather can be
 14 found "in the Exhibits filed with his first motion for preliminary injunction." *Id.* at 5:15–16.³
 15 Plaintiff then also states that his requests for injunctive relief "are more concisely summarized in
 16 Appendix C," *id.* at 5:16–17, which is a new, four-page long discussion of six "issues" Plaintiff
 17 has regarding testing accommodations. This presentation of Plaintiff's request for relief fails to
 18 give this Court or Defendants proper notice of the actual relief sought, and Plaintiff's Renewed
 19 Motion should be denied as a result.

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 21
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 23 _____
 24 ² In addition to the deficiencies discussed at length here, Plaintiff's Renewed Motion is overlong
 25 without leave in violation of Civil Local Rules 7-2(b) and 7-4(b); lacks a proposed order in
 26 violation of Civil Local Rule 7-2(c); and lacks tables of contents or authorities in violation of
 27 Civil Local Rule 7-4(a)(2).

28 ³ As discussed further *infra*, these "Exhibits" are 776 pages of unverified, non-paginated
 materials that were submitted with the prior, now-denied motion. Plaintiff cannot reasonably
 seek relief by directing the Court and Defendants to sift through such materials to determine
 what he is asking the Court to order.

1 In his original motion for preliminary injunction, Plaintiff requested that this Court grant
 2 five specific accommodations, detailed in that motion as well as in his initial complaint as bullet-
 3 point items:

- 4 (1) 150% extra time on the written sections of exam;
- 5 (2) A cap of no more testing time per day than non-disabled test takers;
- 6 (3) Ergonomic/physical equipment supplied in the exam room;
- 7 (4) Specialized disability proctors; and
- 8 (5) 30 minutes of break time per 90 minutes of testing.

9 Dkt. No. 2 at 2:6–10. While Plaintiff’s initial motion made passing statements that he also
 10 desired other additional accommodations, he chose to present only these five, clearly cognizable
 11 requests to the Court.

12 After this Court denied his initial motion for preliminary injunction, Plaintiff was granted
 13 two of those five accommodations by the State Bar—namely, 150% extra time and a cap on per-
 14 day testing time of 6.5 hours. Ex. to Renewed Mot. And with respect to the other three requests,
 15 Plaintiff was not granted formal accommodations but received clarifications—specifically, that
 16 because of COVID-19 protocols he would be tested in a private room with a locking door where
 17 he could store ergonomic equipment; that all proctors would be appropriately trained for their
 18 roles; and that he may use his additional testing time to take breaks at his discretion. *Id.*

19 Plaintiff offers no explanation for why, if he had already requested and still desired
 20 additional accommodations, they were not included along with the five accommodations at issue
 21 in his initial complaint and initial motion for preliminary injunction. However, Plaintiff’s
 22 Renewed Motion, made after receiving some of the accommodations previously requested, now
 23 seeks not simply to dispute the previous bullet-pointed items he did not receive as formal
 24 accommodations. Rather, Plaintiff now asks the Court to grant “the disputed disability
 25 accommodations listed in his petitions to the Committee of Bar Examiners” as detailed in his
 26 four-page long “Appendix C.” Renewed Mot. at 28:3–4.

27 Plaintiff’s discussion presented in “Appendix C” does not present a cognizable request
 28 for relief from this Court. Rather than presenting requests for relief, “Appendix C” expresses six

1 “issues” regarding testing accommodations, which on Defendants’ reading appear to include at
 2 least twenty-two different statements regarding Plaintiff’s desired conduct of the Examination.

3 At times, the discussion of these “issues” does include statements that could potentially
 4 be read as requests for the Court to order Defendants to grant particular accommodations, such as
 5 “[l]ocation of Test Center minimal commute distance from residence.” *Id.* at 34:26. However,
 6 at other times Plaintiff makes conditional statements, *id.* at 32:5–10 (“Assignment to From Home
 7 Modality...Unless State Bar Proves All Possible Methods of Doing So Would be Fundamental
 8 Alteration or Undue Burden”), or appears to plainly ask for fundamental changes to the
 9 administration of the Examination, *id.* at 33:18–21 (“‘Exam Room’...be defined only to be the
 10 desk on which the computer equipment used to take the exam is set up”), or asks for relief that
 11 amounts to assurances about the overall conduct of the Examination and is not reasonably an
 12 accommodation request. *Id.* at 32:25–26 (“That Mr. Kohn’s personal protective equipment...not
 13 be subject to inspection by any means that could contaminate it for its intended purpose of covid
 14 prevention”). Other statements appear to seek clarification on accommodations that have already
 15 been granted, such as “[u]se of a larger-screen external monitor for...ergonomic reasons.” *Id.* at
 16 33:6. Plaintiff even cross-references alleged requests that are not listed anywhere in the
 17 Renewed Motion or in Appendix C. *Id.* at 34:24–25 (“Mitigation of Unequal Accessibility
 18 barriers relative to standard at-home testing, as described in 6/4/2020 narrative for administrative
 19 petition with Exhibits”). Finally, Appendix C also appears to involve a number of contradictory
 20 requests, largely related to whether Plaintiff tests remotely at home or in-person. *Id.* at 32–35.
 21 In light of these many issues, it would not even be possible for the Court to reasonably grant the
 22 requests in Appendix C.

23 This issue is further compounded by the fact that Appendix C appears to make factual
 24 allegations and to request items of relief that are not even clearly captured or contemplated by
 25 Plaintiff’s Amended Complaint. While the prefatory discussion in Plaintiff’s Amended
 26 Complaint states that Plaintiff requests accommodations “listed in Appendix C of his renewed
 27 motion for preliminary injunction,” Am. Compl. at 4:10–12, those accommodations requests are
 28 not explained further in the Amended Complaint, nor in any attachment thereto, and Plaintiff’s

Prayer for Relief continues to seek the same relief sought in the initial complaint, including that the Court order the five bullet-pointed accommodations originally at issue. *Id.* at 28:1–21. Accordingly, it is not clear that Plaintiff’s request for relief here is even sufficiently tied to his Amended Complaint. *See, e.g., Kaimowitz v. Orlando, Fl.*, 122 F.3d 41, 43 (11th Cir.1997), *cert. denied*, 523 U.S. 1138 (1998) (a district court should not issue an injunction on matters “lying wholly outside the issues in the suit”); *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir.1994) (“a party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party’s motion and the conduct asserted in the complaint”).

Plaintiff’s Renewed Motion fails to offer any concise statement about what relief he asks the Court to grant, fails to give Defendants or the Court clear notice of the precise relief sought, and does not even make a cognizable request that this Court could reasonably grant. It should be denied on that basis.

2. Plaintiff’s Renewed Motion is Not Supported by Competent Evidence or Record References in Violation of Civil Local Rules 7-2(d) and 7-5(a).

Plaintiff’s Renewed Motion should also be denied because Plaintiff fails to provide competent evidence in support of his contentions and fails to provide references to the record, in violation of Civil Local Rules 7-2(d) (“Each motion must be accompanied by affidavits or declarations pursuant to Civil L.R. 7-5”) and 7-5(a) (“Factual contentions made in support of or in opposition to any motion must be supported by an affidavit or declaration and by appropriate references to the record”). The sole attachment filed by Plaintiff’s counsel along with the Renewed Motion is a copy of the August 27, 2020 letter from CBE, which communicates CBE’s decision affirming the substantial accommodations already granted to Plaintiff by staff for the October 2020 Examination while clarifying the State Bar’s position on his additional requests. Ex. to Renewed Mot. Plaintiff attaches no evidence regarding the prior requests he made for accommodations, the support he offered therefore, or indeed any other aspect of his claims beyond this final decision letter.

With his initial motion for preliminary injunction, Plaintiff submitted 776 pages of documentation, split over two filings, as a single “exhibit” without any affidavit or declaration to

1 authenticate or explain the voluminous documents submitted. *See* Dkt. Nos. 15 and 16. Indeed,
 2 Plaintiff’s “exhibit” did not even include an index or table in order to identify the documents
 3 within. In opposition to Plaintiff’s initial motion, Defendants raised this issue of noncompliance,
 4 and Plaintiff responded only with a late-filed affidavit attached to his reply brief that purported to
 5 attest to the entire collection of documents as a general matter. *See* Dkt. No. 23-1. However, for
 6 his Renewed Motion, Plaintiff has now failed to address this issue entirely as he has not attached,
 7 or even attempted to cite, support for his contentions. Other than references to the attached CBE
 8 decision letter, Plaintiff offers only two attempts at factual citation in his 28 pages of briefing,
 9 Renewed Mot. at 10:2 and 16:4, despite making dozens of specific factual contentions, including
 10 numerous quotations. And these two citations refer only to a doctor’s report that Plaintiff states
 11 is “attached,” *id.* at 10:2, though no such document is attached to the Renewed Motion. The
 12 remainder of Plaintiff’s factual contentions and quotations have no citation whatsoever—at best,
 13 Plaintiff appears to imply that support for these contentions appears somewhere in the 776 pages
 14 of documentation filed with the previous motion, though that is never made clear.

15 Furthermore, many of Plaintiff’s statements in his Appendix C, purportedly summarizing
 16 his requested relief, are not even tangentially referenced elsewhere in the Renewed Motion. For
 17 instance, in Appendix C Plaintiff states that he requests “increased login time limit and logon
 18 period flexibility” while taking the Examination, Renewed Mot. at 34:12, as well as permission
 19 to bring in food that is not “non-aromatic.” *Id.* at 35:7–8. Neither of these requests are discussed
 20 anywhere outside of Appendix C, and thus Plaintiff has not even attempted to support them with
 21 even general argument, let alone evidentiary support.

22 Plaintiff’s failure to provide competent evidence renders the Renewed Motion
 23 insufficient as a matter of law. “In order to support a preliminary injunction ... irreparable harm
 24 ... must be *demonstrated*, not merely alleged.” *Bell Atl. Business Sys. v. Storage Technology*
 25 *Corp.*, 1994 U.S. Dist. LEXIS 4471, at *1 (N.D. Cal. Mar. 31, 1994) (emphasis in original).
 26 This requires the moving party to present “probative evidence” in the form of a verified
 27 complaint, sworn affidavits, and the like. *See Walker v. County of Santa Clara*, 2011 U.S. Dist.
 28 LEXIS 104415, at *7 (N.D. Cal. Sept. 15, 2011); *American Passage Med Corp. v. Cass*

1 *Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (reversing grant of preliminary
 2 injunction where there was insufficient evidence of irreparable harm). Accordingly, Plaintiff
 3 cannot support his motion only by implicitly asking the Court and Defendants to comb through a
 4 776-page collection of documents, which were neither authenticated nor even attached to the
 5 instant Renewed Motion, in order to find support for his current allegations—particularly where
 6 in most cases he provides no attempt at citation whatsoever.

7 At a minimum, this lack of proper evidentiary support means that Plaintiff has not met his
 8 high burden to establish that the law and facts “clearly favor” his position, as is required to
 9 entitle him to a mandatory preliminary injunction. *Garcia, supra*, 786 F.3d at 740. Nor would it
 10 be permissible for Plaintiff to supplement the record with such evidence or declarations on reply
 11 or orally. Federal Rule of Civil Procedure 6(c)(2) (“Any affidavit supporting a motion must be
 12 served with the motion.”); *Am. Promotional Events, Inc. v. City & Cty. of Honolulu*, 796 F.
 13 Supp. 2d 1261, 1284 (D. Haw. 2011) (“conclusory statements provided at [a] hearing alone
 14 cannot support a finding of irreparable injury for the issuance of a preliminary injunction”). The
 15 Renewed Motion should be denied on these grounds alone.⁴

16 **B. Plaintiff Cannot Show that The Law And Facts Clearly Favor His Position.**

17 Should the Court further entertain Plaintiff’s Renewed Motion, it should nevertheless be
 18 denied because the Renewed Motion has not demonstrated a likelihood of success on the merits,
 19 and certainly has not met Plaintiff’s burden to establish that the law and facts clearly favor his
 20 position such that a mandatory preliminary injunction is appropriate. To the contrary, as
 21 explained below, Plaintiff is not likely to succeed on the merits.

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 25 ⁴ Should the Court choose to accept Plaintiff’s general references to prior filings and this prior
 26 “exhibit” as proper support for his Renewed Motion, it should in fairness also review and
 27 consider all of Defendants’ filings and supporting exhibits, including Defendants’ prior
 28 opposition to Plaintiff’s initial motion for preliminary injunction, Dkt. No. 21, Defendants’
 motion to dismiss the initial complaint and reply in support thereof, Dkt. Nos. 22 and 28, and any
 upcoming motion in response to Plaintiff’s Amended Complaint.

1 **1. Most of Plaintiff's Claims are Barred as a Matter of Law.**

2 Most of the claims in Plaintiff's Amended Complaint are subject to dismissal as a matter
3 of law because they are either barred by Eleventh Amendment immunity or are brought under
4 statutes that do not apply to the State Bar of California. Plaintiff's Complaint purports to bring
5 claims under (1) Title II of the ADA; (2) the Rehabilitation Act; (3) California Government Code
6 sections 11135 *et seq.* and 12944 *et seq.*; and (4) the California Unruh Act. The State Bar is
7 immune under the Eleventh Amendment to claims for money damages under Title II of the
8 ADA—Plaintiff may only attempt to proceed on claims for injunctive relief. And all of
9 Plaintiff's claims under the other statutes alleged are barred because the State Bar is not subject
10 to those statutes.⁵

11 a) The State Bar is Immune to Plaintiff's Claims for Money Damages
12 Under Title II of the ADA.

13 The State Bar of California is an arm of the state entitled to Eleventh Amendment
14 immunity. *See, e.g., Hirsh v. Justices of Supreme Court*, 67 F.3d 708, 712, 715 (9th Cir. 1995);
15 *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985) (affirming dismissal on Eleventh
16 Amendment grounds of suit against State Bar of California), *cert. denied*, 474 U.S. 916 (1985).⁶

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19 ⁵ These arguments are also raised, in greater detail, in Defendants' motion to dismiss Plaintiff's
initial complaint and their reply in support thereof. *See* Dkt. Nos. 22 and 28.

20 ⁶ District courts in California hold uniformly that the State Bar enjoys Eleventh Amendment
immunity. *See, e.g., Konig v. State Bar of Cal.*, No. C 04-2210 MJJ, 2004 U.S. Dist. LEXIS
21 19498, at *7 (N.D. Cal. Sep. 16, 2004) ("The Ninth Circuit and this Court have held that the
Eleventh Amendment applies to the State Bar."); *Kay v. State Bar of Cal.*, No. C 09-1135 PJH,
22 2009 U.S. Dist. LEXIS 43400, at *5 (N.D. Cal. May 21, 2009) ("It is well established that the
State Bar and the State Bar's Board of Governors are arms of the State for Eleventh Amendment
23 purposes."); *Albert v. State Bar of Cal.*, No. SA CV 14-1905-DOC (ANx), 2015 U.S. Dist.
LEXIS 189124, at *19 (C.D. Cal. Mar. 27, 2015) ("it is abundantly clear that the Eleventh
24 Amendment applies to suits against the State Bar."); *Wu v. State Bar*, 953 F. Supp. 315, 318
25 (C.D. Cal. 1997) ("The Eleventh Amendment provides the State Bar of California with immunity
from suits in federal court for monetary relief."); *Allegrino v. State Bar of Cal.*, Nos. C06-05490
26 MJJ, C07-00301 MJJ, 2007 U.S. Dist. LEXIS 40155 (N.D. Cal. May 10, 2007) (State Bar of
California is an "arm of the state" entitled to Eleventh Amendment immunity); *Tanasescu v.*
27 *State Bar of Cal.*, No. SACV 11-00700-CJC (MAN), 2012 U.S. Dist. LEXIS 56679 (C.D. Cal.
Mar. 26, 2012) (same); *Khanna v. State Bar of Cal.*, 505 F. Supp. 2d 633, 644 (N.D. Cal. 2007)

1 While Title II of the ADA may, in certain circumstances, abrogate Eleventh Amendment
 2 immunity, *see Tennessee v. Lane*, 541 U.S. 509, 530–534 (2004) (Abrogation of Eleventh
 3 Amendment immunity under Title II of the ADA is constitutional “as it applies to the class of
 4 cases implicating the fundamental right of access to the courts.”), Plaintiff’s claims for money
 5 damages do not fall into the category of claims for which Congress has validly abrogated the
 6 state’s sovereign immunity. *See United States v. Georgia*, 546 U.S. 151, 159 (2000) (“[I]nsofar
 7 as Title II [of the ADA] creates a private cause of action for damages against the State for
 8 conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state
 9 sovereign immunity.”). Plaintiff has failed to state a Title II claim arising from a violation of his
 10 constitutional rights, and therefore his claim does not fall into the category of claims for which
 11 Congress validly abrogated the state’s Eleventh Amendment immunity. His claims for money
 12 damages under the ADA accordingly fail as a matter of law.

13 b) The State Bar is Not Subject to the Rehabilitation Act Because it is
 14 Not a Recipient of Federal Funds.

15 To be subject to the Rehabilitation Act, 29 U.S.C. § 794, a state government entity must
 16 “receive[] Federal financial assistance.” 29 U.S.C. § 794(a). Plaintiff merely alleges in his
 17 Amended Complaint that the State Bar “benefit[s] from federal funding” but pleads no facts in
 18 support of this allegation. Am. Compl. at 10:11–13. In fact, the State Bar does not receive any
 19 federal funds. *See Declaration of John Adams in Support of Motion to Dismiss Complaint* [Dkt.
 20 No. 22-2]. Plaintiff’s claims arising under the Rehabilitation Act are thus subject to dismissal as
 21 a matter of law. *See, e.g., C.G. v. Redding Christian Sch.*, No. 2:19-cv-00348-MCE-DMC, 2020
 22 U.S. Dist. LEXIS 46251 (E.D. Cal. Mar. 16, 2020) (granting motion to dismiss Rehabilitation
 23 Act claim where Defendant established that it did not receive federal funds).

24
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 27 (same); *Putman v. State Bar of Cal.*, No. SACV 08-625-DSF(CW), 2010 U.S. Dist. LEXIS
 28 80283, at *21 (C.D. Cal. June 25, 2010) (same).

1 c) The State Bar is Expressly Exempted from California Government
Code Sections 11135 *et seq.* and 12944 *et seq.*

2 Plaintiff's claims arising under the California Government Code are subject to dismissal
3 as a matter of law because the State Bar is expressly exempt from those state statutes. The State
4 Bar Act (the State Bar's organic statute) expressly exempts the State Bar from Cal. Gov. Code
5 § 11135 *et seq.* and § 12944 *et seq.* *See* California Business and Professions Code section 6001
6 (exempting the State Bar from the requirements of Division 3 of Title 2 of the California
7 Government Code, which includes sections 11135 *et seq.* and 12944 *et seq.*). Because the
8 Legislature has expressly exempted the State Bar from the provisions of the Government Code
9 invoked by Plaintiff, those state law claims fail as a matter of law.

10 d) The State Bar is Not Subject to the Unruh Act, and Regardless,
11 Plaintiff Still Has Not Pleaded Compliance with the Government
Claims Act.

12 Plaintiff's Amended Complaint also alleges that each identified violation of the ADA is
13 also a violation of the California Unruh Act, Cal. Civ. Code § 51(f). *Am. Compl.* at 27:20–28.
14 But Plaintiff also cannot state a claim against Defendants under the Unruh Act on the basis of an
15 alleged Title II violation because the Unruh Act applies, by its terms, to “business
16 establishments.” Cal. Civ. Code § 51(b). California courts have expressly held that government
17 agencies are not “business establishments” and are not subject to the Unruh Act. *See, e.g.,*
18 *Harrison v. City of Rancho Mirage*, 243 Cal. App. 4th 162, 176 (2015) (holding that city is not
19 subject to the Unruh Act) (citing *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th
20 734, 764 (2010) (city's enactment of legislation cannot be challenged through the Unruh Act
21 because the city does not act as a “business establishment” when it enacts official policies)).

22 Nor does the Amended Complaint's particular citation to subsection (f) of Cal. Civ. Code
23 § 51 transform Plaintiff's Unruh Act claims into viable claims against Defendants. While § 51(f)
24 states that a violation of the ADA “shall also constitute a violation of this section,” courts have
25 consistently held that such application is limited. *See, e.g., Bass v. County of Butte*, 458 F.3d
26 978, 982 (9th Cir. 2006) (refusing to read § 51(f) in isolation and finding it is intended to
27 incorporate “only those provisions of the ADA germane to the original scope of” the prior
28 version of the California Unruh Act). Accordingly, Plaintiff has failed to state a claim against

1 Defendants under the Unruh Act.

2 Furthermore, Plaintiff may not proceed on his Unruh Act claims because his Amended
3 Complaint still does not properly plead compliance with the California Government Claims Act.
4 Cal. Gov. Code, §§ 945.4, 950.2, 912.4; *see DiCampi-Mintz v. County of Santa Clara*, 55
5 Cal.4th 983, 989–90 (2012). While Plaintiff’s Amended Complaint alleges that he belatedly
6 presented a government claim—after this lawsuit was already filed—it nowhere alleges that his
7 government claim has been rejected or deemed rejected by the passage of time.

8 **2. Plaintiff Cannot Show that the Law and Facts Clearly Favor His**
9 **Claims for Mandatory Injunctive Relief Because, at a Minimum,**
10 **Significant Factual Questions Exist Under the ADA as to Whether**
Reasonable Accommodations Were Already Offered.

11 While this Court has jurisdiction to order injunctive relief under Title II of the ADA,
12 Plaintiff has also failed to allege a cognizable ADA claim, much less to show that he is entitled
13 to a mandatory preliminary injunction.⁷ This is true as an initial matter because Plaintiff has
14 failed to offer nearly any proper evidence, *see* Section IV.A.2, *supra*, and remains true even if
15 the Court proceeds to examine Plaintiff’s claims further.

16 a) The ADA Legal Standard.

17 The State Bar is subject to Title II of the ADA, 42 U.S.C. § 12131(1)(b), which mandates
18 that “no qualified individual with a disability shall, by reason of such disability, be excluded
19 from participation or denied the benefits of the services, program or activities of a public entity,
20 or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

21 The regulations implementing Title II prohibit public entities from denying disabled
22 individuals the opportunity to participate in a public program on an equal basis with those who
23 are not disabled. 28 CFR § 35.130(b)(1)(i), (ii). Public entities must also provide auxiliary aids,
24 services or program modifications that are effective in allowing qualified individuals with
25 disabilities an “equal opportunity to obtain the same result, to gain the same benefit or reach the
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27 ⁷ These arguments are also raised, in greater detail, in Defendants’ motion to dismiss Plaintiff’s
28 initial complaint and their reply in support thereof. *See* Dkt. Nos. 22 and 28.

1 same level of achievement as provided to others.” 28 CFR § 35.130(b)(1)(iii). These standards
 2 apply when public agencies administer professional licensing programs. 28 CFR § 35.130(b)(6).
 3 However, a public entity is not required “to take any action that it can demonstrate would result
 4 in a fundamental alteration in the nature of a service, program, or activity or in undue financial
 5 and administrative burdens.” 28 CFR § 35.164. The legal obligations imposed by Title II and its
 6 regulations have been summarized by the Ninth Circuit as follows:

7 Title II and its implementing regulations, taken together, require public entities to
 8 take steps toward making existing services not just accessible, but *equally*
 9 accessible to [qualified individuals with disabilities], but only insofar as doing so
 does not pose an undue burden or require a fundamental alteration of their
 programs.

10 *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013) (emphasis
 11 added).

12 In order to state a claim for relief under Title II of the ADA, a plaintiff must allege the
 13 following elements: (1) the plaintiff is an individual with a disability; (2) the plaintiff was either
 14 excluded from participation in or denied the benefits of the public entity’s services, programs or
 15 activities, or was otherwise discriminated against by the public entity; and (3) that such
 16 exclusion, denial of benefits, or discrimination was by reason of the plaintiff’s disability.

17 *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997).

18 Accordingly, in order to show likelihood of success on the merits in this case, Plaintiff
 19 here “must show that the accommodation [h]e seeks is a reasonable accommodation and that the
 20 accommodations [h]e is currently being provided are not.” *Sung-Miller v. Regents of the Univ.*
 21 *of Cal.*, No.: CV 20-00768 AB, 2020 WL 3628710, at *3 (C.D. Cal. Mar. 16, 2020). And in
 22 order to obtain a mandatory injunction, Plaintiff has the even greater burden here of showing
 23 “that the law and facts *clearly favor* [this] position, not simply that [h]e is likely to succeed.”
 24 *Garcia, supra*, 786 F.3d at 740; *see also Sung-Miller, supra*, 2020 WL 3628710 (denying
 25 preliminary injunction regarding academic accommodations under Title II on the basis of
 26 “significant factual disputes” as to whether already-provided accommodations, as opposed to the
 27 plaintiff’s requested accommodations, are “reasonable” under the ADA).
 28

b) Plaintiff Has Already Been Granted Effective and Reasonable Accommodations Which, at Minimum, Create Significant Factual Issues as to Plaintiff's Title II Claims that Make a Mandatory Preliminary Injunction Inappropriate.

This is not a case in which reasonable accommodations were requested and wholly denied. Rather, Plaintiff acknowledges that he has been granted substantial accommodations for the October 2020 Examination, including his requested extra testing time and test-day scheduling modifications, permission to bring any necessary ergonomic equipment, and the ability to use a laptop computer and to bring food and drink into the examination. See Section II.B.1, *supra*. He has also been informed that, as a practical COVID-19 safety matter, he will be tested in a private room, where he may leave his ergonomic equipment behind a locked door between examination sessions. Ex. to Renewed Mot.

Nevertheless, and without proper evidentiary support, Plaintiff contends that the difference between his requested accommodations (presumably, those outlined in "Appendix C") and the ones already granted amounts to a Title II violation because the State Bar is required "as a matter of law" to accept the opinions and judgments of his experts "at face value and in the light most favorable to him." Renewed Mot. at 23:6–11. In support of this assertion, Plaintiff relies on *Enyart v. National Conference of Bar Examiners*, 823 F.Supp.2d 995, 1001 (N.D. Cal. 2011). But *Enyart* does not support Plaintiff's position. The portion of *Enyart* to which Plaintiff cites merely discusses the standard for admissibility of expert witness testimony under Rule 702 of the Federal Rules of Evidence. *Id.* In granting a motion for summary judgment for plaintiff *Enyart*, the court considered the expert testimony proffered by both parties and determined that only *Enyart* had presented admissible expert testimony relevant to the accommodations at issue in that case. *Id.* at 1002–09. Contrary to Plaintiff's assertion in his Motion, *Enyart* nowhere states that a public agency violates Title II if it declines to adopt wholesale the medical recommendation submitted by the disabled individual. As noted above, a public agency is entitled to review such a request to, among other things, determine whether a recommended accommodation would create an undue burden on the agency or fundamentally alter the examination, *see* 28 CFR § 35.164, and regardless must provide accommodations that create an

1 equal opportunity of participation, and not accommodations that guarantee particular
 2 examination results. *See* 28 CFR § 35.130(b)(1)(iii).⁸

3 Plaintiff's request for a mandatory preliminary injunction should be denied because
 4 Plaintiff has not shown that the law and facts clearly favor his position. Plaintiff cannot meet his
 5 burden where there are, at a minimum, "significant factual disputes" as to whether his requested
 6 level of accommodations (as opposed to the accommodations already granted) is reasonable.
 7 *Sung-Miller, supra*, 2020 WL 3628710, at *3. Here, those issues are further highlighted by the
 8 fact that Plaintiff's requested accommodations, at least as stated in "Appendix C," are so
 9 expansive and inconsistent that they inherently raise the question of whether they are not
 10 "reasonable" because they could fundamentally alter the administration of the California Bar
 11 Examination. *See* 28 CFR § 35.164; *K.M. ex rel. Bright, supra*, 725 F.3d at 1097 (Title II
 12 requires a public entity to make its facilities equally accessible to people with disabilities "but
 13 only insofar as doing so does not pose an undue burden or require a fundamental alteration of
 14 their programs."); State Bar Rule 4.82(D)(1) (State Bar definition of "reasonable testing
 15 accommodation" includes that it will not "compromise the security or validity of an examination
 16 or the integrity or of the examination process."). For example, "Appendix C" includes requests
 17 such as "[p]ermission to use restroom freely and still return to test session in progress" and
 18 "[e]xemption from AI or remote proctoring security flags" if taking the Examination remotely,
 19 which both clearly and inherently raise issues of examination security and potential cheating.
 20 Renewed Mot. at 33:14; 33:25. Plaintiff offers no attempt to resolve these issues—nor could
 21 he—and accordingly he cannot avoid the fact that, at a minimum, his requests for such

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 23
 24 ⁸ Furthermore, the claims in Plaintiff's Amended Complaint that relate only to the timing or
 25 procedures of Defendants' accommodations petition process, and not the actual accommodations
 26 provided to Plaintiff, also fail to state a claim. Neither Title II nor its regulations dictates any
 27 particular process for receiving accommodation requests, any precise timeline for deciding on
 28 accommodation requests, any particular process for how such decisions should be reached, nor
 how much explanation must be given about an accommodation decision to a qualified individual
 with a disability. *See* Defendants' Motion to Dismiss [Dkt. No. 22] at 16:7–18:14 and Reply in
 support thereof [Dkt. No. 28] at 8:22–9:23.

1 accommodations raise significant factual questions that make a mandatory preliminary injunction
2 inappropriate.

3 In short, Plaintiff has not met his burden of demonstrating that the law and facts clearly
4 favor his position that a mandatory preliminary injunction is appropriate. Accordingly, his
5 Renewed Motion should be denied.

6 **C. Plaintiff Fails to Allege Irreparable Harm Should the Preliminary Injunction**
7 **be Denied.**

8 Plaintiff's Renewed Motion should also be denied because he has not demonstrated that
9 he would suffer irreparable harm if the Court does not grant an injunction. A mandatory
10 preliminary injunction should "not [be] granted unless extreme or very serious damage will
11 result and [is] not issued in doubtful cases..." *Marlyn Nutraceuticals, Inc., supra*, 571 F.3d at
12 879 (citation omitted).

13 Here, Plaintiff states that the irreparable harm at risk in this case is "sending Mr. Kohn
14 into the exam with inadequate and discriminatory accommodations." Renewed Mot. at 25:3–4.
15 More specifically, he argues that (1) he expects that he will lack sufficient money to take the
16 California Bar Examination again in 2021 if he does not pass this upcoming administration;
17 (2) he will need an extension on his moral character application if he does not pass the
18 examination in October; (3) if he fails to pass the October 2020 Examination he will need to find
19 non-legal employment, which will prevent him from effectively studying for a future
20 examination; (4) he will lose the benefit of his recent exam preparation if he must take a future
21 administration; and (5) he may contract COVID-19 during the Examination. *Id.* at 25:7–26:9.

22 None of Plaintiff's contentions amounts to the type of extreme or very serious damage
23 that can create a showing of irreparable harm. Notably, Plaintiff's contentions that he would
24 struggle financially and lose the benefit of recent studying if required to take a future
25 examination should he fail in October are insufficient, as these contentions are all inextricably
26 bound to the unsupportable assumption that Plaintiff will definitely pass if a preliminary
27 injunction is issued, and will definitely fail otherwise. Furthermore, these contentions directly
28 acknowledge the available opportunity of future examinations, which itself indicates that any

harm would not be irreparable. *See Kelly v. West Virginia Bd. of Law Examiners*, No. 2:08-00933, 2008 WL 2891036, at *2 (S.D. W. Va. July 24, 2008) (finding that the provision of time-and-a-half instead of double time on bar examination would not create irreparable harm, despite the fact that it would be “undesirable” to have to retake a future administration of the examination should the plaintiff fail).⁹ And as for Plaintiff’s passing assertion that he may contract COVID-19 during the Examination, Plaintiff draws no connection between this speculative risk and his requested accommodations, and regardless appears to be expressing a general concern about safety protocols rather than an issue specific to disability accommodations.

Accordingly, this Court should also find that Plaintiff’s request for a mandatory preliminary injunction should be denied on the basis that he has not clearly demonstrated that he faces the risk of irreparable harm.

D. Plaintiff Has Still Failed to Exhaust His Available Administrative Remedies Through the California Rules of Court.

Finally, even if this Court declines to deny Plaintiff’s Renewed Motion on any other grounds, it should still deny it on the basis of Plaintiff’s failure to exhaust his available remedies. In its August 13, 2020 Order denying Plaintiff’s initial motion for preliminary injunction as prudentially unripe, this Court noted not only that CBE had at that time yet to make a decision on Plaintiff’s appeal, but also that, pursuant to California Rule of Court 9.13(d), Plaintiff would have the ability to petition the California Supreme Court for review of a final CBE decision. *See Order Denying Motion for Preliminary Injunction* [Dkt. No. 26] at 7:22–23. While Plaintiff now

⁹ Furthermore, while Defendants maintain that Plaintiff’s claims for monetary damages are all barred as a matter of law, Plaintiff’s Amended Complaint does continue to seek damages for costs previously expended, lost wages and career development, and lost reputation. Am. Compl. at 28:23–30:16. Should the Court find any of these damages claims legally viable, then the availability of such monetary relief would also mean that his alleged harms cannot be irreparable. *See, e.g., Marlyn Nutraceuticals, Inc.*, supra, 571 F.3d at 879 (mandatory preliminary injunction should also not be issued “where the injury complained of is capable of compensation in damages”).

1 contends that he lacked sufficient time to file a petition for review pursuant to California Rule of
2 Court 9.13(d), Renewed Mot. at 4:4–29, this contention ignores the fact that he was—and is—
3 free to seek an immediate stay or otherwise seek relief on an emergency or expedited basis,
4 including by writ of mandate. *See* California Rules of Court 8.485 et seq. This Court may deny
5 the Renewed Motion on this basis as well.

6 **V. CONCLUSION**

7 For all of the reasons stated above, this Court should find that Plaintiff has failed to meet
8 his burden to show that he is entitled to a mandatory preliminary injunction, and should deny
9 Plaintiff's Renewed Motion.

10
11 Dated: September 14, 2020

OFFICE OF GENERAL COUNSEL
THE STATE BAR OF CALIFORNIA

12
13 By: /s/ KENNETH J. HOLLOWAY
14 KENNETH J. HOLLOWAY
15 Assistant General Counsel
16 Attorneys for Defendants
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1 **DECLARATION OF SERVICE**

2 I, Joan Randolph, hereby declare: that I am over the age of eighteen years and am not a
3 party to the within above-entitled action, that I am employed in the City and County of San
4 Francisco, that my business address is The State Bar of California, 180 Howard Street, San
5 Francisco, CA 94105.

6 On September 14, 2020, following ordinary business practice, I filed via the United
7 States District Court, Northern District of California electronic case filing system, the following:

8 **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY**
9 **INJUNCTION**

10 Participants in the case who are registered CM/ECF users will be served.

11 *See the CM/ECF service list.*

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct.

14 Executed at San Francisco, California, on September 14, 2020.

15 /s/Joan Randolph
16 Joan Randolph